2008

# DFI Properties, LLC v. GR2 Enterprises LLC : Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

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| DFI PROPERTIES LLC, | : | |
| Plaintiff/Appellee, | : | Case No. 20081067CA |
| -vs- | : | |
| GR 2 ENTERPRISES LLC, | : | |
| Defendant/Appellant. | | |

**BRIEF OF APPELLANT**

Appeal from District Court's December 9, 2008 Order and Judgment in the Fourth Judicial District Court in and for Utah County, The Honorable David Mortensen presiding. Appellant/Defendant is not presently incarcerated. This is not an *Anders* brief.

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**CASE LAW**

**OTHER**

## DETERMINATIVE STATUTORY PROVISIONS

UTAH RULE OF CIVIL PROCEDURE 11:
**Signing of pleadings, motions, affidavits, and other papers; representations to court; sanctions.**

(a) Signature.

(a)(1) Every pleading, written motion, and other paper shall be signed by at least one attorney of record, or, if the party is not represented, by the party.

(a)(2) A person may sign a paper using any form of signature recognized by law as binding. Unless required by statute, a paper need not be accompanied by affidavit or have a notarized, verified or acknowledged signature. If a rule requires an affidavit or a notarized, verified or acknowledged signature, the person may submit a declaration pursuant to Utah Code Section 78B-5-705. If a statute requires an affidavit or a notarized, verified or acknowledged signature and the party electronically files the paper, the signature shall be notarized pursuant to Utah Code Section 46-1-16.

(a)(3) An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) Representations to court. By presenting a pleading, written motion, or other paper to the court (whether by signing, filing, submitting, or advocating), an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,

(b)(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(b)(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(b)(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(b)(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(c)(1) How initiated.

(c)(1)(A) By motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney fees incurred in presenting or opposing the motion. In appropriate circumstances, a law firm may be held jointly responsible for violations committed by its partners, members, and employees.

(c)(1)(B) On court's initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(c)(2) Nature of sanction; limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorney fees and other expenses incurred as a direct result of the violation.

(c)(2)(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(c)(2)(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(c)(3) Order. When imposing sanctions, the court shall describe the conduct

determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) Inapplicability to discovery. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.

## STATEMENT OF ISSUES AND STANDARDS OF REVIEW

### ISSUE ONE

Whether the District Court erred as a matter of law in holding that GR 2 was responsible, under Utah Rule of Civil Procedure 11(b), for a representation to the court made by a non-attorney member of GR 2, when Rule 11(b) only applies to representations made by an attorney or unrepresented party, GR 2 was represented by an attorney at the time, and the filing was not made by GR 2's attorney?

Standard of Review

In evaluating the imposition of Rule 11 sanctions, legal conclusions are reviewed under the legal correctness standard. Morse v. Packer, 1999 UT 5, ¶ 12-13, 973 P.2d 422, (Utah 1999). Under this standard, 'correctness' means that the appellate court decides the matter for itself and does not defer in any degree to the trial judge's determination of law. Id.

Preservation for Appeal

This issue was preserved in GR 2's Motion to Set Aside Judgment, filed on December 12, 2008, and during the hearing on GR 2's Motion to Set Aside Judgment, held December 23, 2008. (R. 225, 295:19).

### ISSUE TWO

Whether the District Court violated GR 2's due process rights under Utah Rule of Civil Procedure 11(c) when it failed to enter an order to show cause prior to sua sponte scheduling a Rule 11 hearing, provided GR 2 with only a day's notice of

the Rule 11 hearing, and did not provide GR2 with any reasonable opportunity to respond prior to making a determination at the hearing?

Standard of Review

Legal conclusions, including whether procedural and due process requirements have been met, are questions of law that are reviewed for correctness. In re: K.M., 965 P.2d 576, 579 (Utah Ct. App. 1998).

Preservation for Appeal

This issue was preserved in GR 2's Motion to Set Aside Judgment, filed on December 12, 2008, and during the hearing on GR 2's Motion to Set Aside Judgment, held December 23, 2008. (R. 225, 295:18).

**ISSUE THREE**

Whether the District Court violated the procedural requirements of Utah Rule of Civil Procedure 11 when it failed to enter an order describing the violating conduct and explaining the basis for the sanction imposed?

Standard of Review

Legal conclusions, including whether a Trial Court's Order complied with the requirements of Rule 11, are reviewed under the legal correctness standard. Morse v. Packer, 1999 UT 5, ¶ 12-13, 973 P.2d 422, (Utah 1999). Under this standard, 'correctness' means that the appellate court decides the matter for itself and does not defer in any degree to the trial judge's determination of law. Id.

Preservation for Appeal

This issue was preserved in GR 2's Motion to Set Aside Judgment, filed on December 12, 2008, and during the hearing on GR 2's Motion to Set Aside Judgment, held December 23, 2008. (R. 225, 295:26-27).

**ISSUE FOUR**

Whether the District Court erred as a matter of law in holding that the filings by Mr. Granados violated Utah Rule of Civil Procedure 11 when (1) there is no Utah precedent dealing with pleadings issued by the tribal courts of unrecognized native american tribes and (2) it is not well settled in other jurisdictions that the filing of such pleadings is a Rule 11 violation.

Standard of Review

A trial court's ultimate conclusion that rule 11 was violated and any subsidiary legal conclusions are reviewed under the correction of error standard. Barnard v. Sutliff, 846 P.2d 1229, 1234 (Utah 1992).

Preservation for Appeal

This issue was preserved in GR 2's Motion to Set Aside Judgment, filed on December 12, 2008, and during the hearing on GR 2's Motion to Set Aside Judgment, held December 23, 2008. (R. 225, 295:21-25).

**ISSUE FIVE**

Whether the District Court erred as a matter of law because entry of a default

judgment is not authorized as a sanction for a violation of Utah Rule of Civil Procedure 11 or, alternatively, whether the District Court abused its discretion, under the circumstances of this case, when it imposed the sanction of a default judgment.

Standard of Review

A trial court's ultimate conclusion that rule 11 was violated and any subsidiary legal conclusions are reviewed under the correction of error standard. Barnard v. Sutliff, 846 P.2d 1229, 1234 (Utah 1992). A trial court's determination as to the type and amount of sanction to be imposed is reviewed under the abuse of discretion standard. Id.

Preservation for Appeal

This issue was preserved in GR 2's Motion to Set Aside Judgment, filed on December 12, 2008, and during the hearing on GR 2's Motion to Set Aside Judgment, held December 23, 2008. (R. 225, 295:19-20, 26).

## STATEMENT OF JURISDICTION

The Utah Court of Appeal has jurisdiction in this matter pursuant to Utah Code Annotated §78A-4-103(2)(j) (2009) whereby the Utah Court of Appeals has jurisdiction over cases transferred to the Utah Court of Appeals from the Utah Supreme Court. In this case, the Utah Supreme Court had jurisdiction pursuant to Utah Code Annotated §78A-3-102(3)(j) (2009), whereby the Utah Supreme Court has jurisdiction over orders, judgments, and decrees of any court of record over which the Court of Appeals does not have original appellate jurisdiction, and transferred the case to the Utah Court of Appeals on January 5, 2009.

## STATEMENT OF THE CASE

### PROCEDURAL HISTORY

This is an appeal from a December 9, 2009, order of the district court finding Defendant/Appellant GR 2 Enterprises LLC ("GR 2") to be in violation of Utah Rule of Civil Procedure 11 and, as a sanction, entering a default judgment against GR 2. (R: 204, 223, 294).

On October 16, 2008, a Complaint for Eviction was filed against GR2 by appellee DFI Properties LLC ("DFI"). (R. 7). GR2 answered and counter-claimed against DFI on October 21, 2008. (R. 29). On November 12, 2008, the district court scheduled the matter for a jury trial to begin on December 17, 2008. (R. 166). On November 26, 2008, GR2's attorney, Mr. Randall Jeffs, filed a Motion to Withdraw as counsel. (R. 183). On December 4, 2008, in a telephonic conference that was held off the record, the district

court apparently denied or deferred ruling on Mr. Jeff's Motion to Withdraw because it would have required a continuance of the trial. (R. 193). On December 8, 2008, Mr. Juan Antonio Granados, a member of GR 2, filed a Petition for Hearing to Show Cause, Stay of Proceedings and For Declaratory Relief, an Order for Hearing to Show Cause, and an Order to Stay Proceedings. (R. 194-202). On the same day, the district court held a telephonic conference with Mr. Jeffs and Counsel for DFI. (R.293). At the telephonic conference, the district court informed the parties that it was, sua sponte, scheduling a Rule 11 hearing for the next day, December 9, 2008. (R. 293:6-7). At the Rule 11 hearing, the district court held GR 2 to be in violation of Rule 11 and, as a sanction, struck GR 2's answer and counterclaim and entered a default judgment against it. (R: 204, 223, 294).

GR 2 subsequently retained new counsel and filed Motions to Set Aside Judgment and Stay Execution of Judgment on December 12, 2008. (R. 225-240). GR 2 also filed a Notice of Appeal on December 19, 2009. On December 23, 2008, the district court held a hearing in which it denied GR 2's motions. (R. 277).

**FACTUAL BACKGROUND**

On November 26, 2008, GR2's former attorney, Mr. Randall Jeffs, filed a Motion to Withdraw as counsel. (R. 183). In the motion, Mr. Jeffs explained that he was seeking to withdraw because he could not reach an agreement with GR 2 "on the proper process for preparing the case for trial and the appropriate way to present evidence and testimony at trial" and GR 2 had failed to return his communications. (R.182-83). Because the underlying case was for unlawful detainer and GR 2 was still occupying the property in question, the district court had previously ruled that a trial of the unlawful detainer issue had to be conducted within 60 days pursuant to Utah Code Ann. § 70B-6-810. (R. 291-

92). Accordingly, on December 4, in a pretrial conference that was held off the record, the district court apparently ruled that, unless GR 2 vacated the property, Mr. Jeff's would not be permitted to withdraw because the trial date could not be continued while GR 2 still occupied the property. (R. 193).

The nature of the communications between Mr. Jeffs and GR 2 regarding Mr. Jeff's Motion to Withdraw are not contained in the record. Apparently, Mr. Juan Antonio Granados, one of the members of GR 2, believed that Mr. Jeff no longer represented GR 2 and that the trial would proceed as scheduled on December 17, 2009. As a result, GR2 consulted with Mr. Henry Clayton, the Chief Justice of the Nato Nation Indian Tribe (the "Nato Nation"). Mr. Clayton informed Mr. Granados that GR 2 could remove the case to the Nato Nation's Tribal Court and that GR 2 did not need to be represented by an attorney in tribal court. Accordingly, on December 8, 2008, Mr. Granados filed three documents with the district court: a Petition for Hearing to Show Cause, Stay of Proceedings and For Declaratory Relief, an Order for Hearing to Show Cause, and an Order to Stay Proceedings (the "Nato Nation documents"). (R. 194-202). All three documents were titled as having been prepared for and filed in the First Federal District Court Western Region. (R. 195, 197, 202).

On the very same day that Mr. Granados filed the Nato Nation documents, the district court initiated a review hearing with Mr. Jeffs and DFI's counsel. (R. 293). At the hearing, the district court stated that it had received the documents filed by Mr. Granados and that "the first thing I need to do is to have a Rule 11 contempt hearing in the next a, little while to decide whether to strike all of defendant's pleadings and enter a default based on a Rule 11 violation." (R 293:4). The district court further stated that "given these intervening pleadings a, I'm not willing to interfere with the lives of a, 30 to 40 members of our public when bad faith action such as this have taken place." (R:

293:4-5). The district court then scheduled a Rule 11 hearing for 2:30pm the next day, December 9, 2008. (R. 203, 293:5).

During the December 8 hearing the district court also told Mr. Jeffs that it "totally [understood] the perplexing and uncomfortable situation that this puts you in … And if you can just abide a little further a, we will release you from this case because it's not tenable for you to continue under the circumstances." (R. 293:5). Mr. Jeffs was asked to inform GR 2 of the hearing by letter and "if you fear for your safety I would suggest you employ a constable to serve your letter." (R.293:6). After the district court noted that "Mr. Granados is attempting to move forward pro se representing a corporate entity, which as we all know is not going to happen … [s]o in your letter inform him that if he wants to be heard he'll need to bring a lawyer," it told Mr. Jeffs that "at the end of the hearing tomorrow I'll make a final ruling on your motion to withdraw." (R 293:6-7).

At the Rule 11 hearing, Mr. Jeffs initially appeared for GR 2. (R. 294:1). However, before proceeding with the argument, the district court asked Mr. Granados to confirm that GR 2 no longer desired Mr. Jeffs as its attorney. (R. 294:2). Mr. Granados responded as follows: "According to the letter he sent me two days ago that he requires more money [with the remaining response being inaudible]." Id. The district court then told Mr. Jeffs that "I'm going to ask you to stay here because I haven't released you yet but you may take a seat … [a]nd I'll allow Mr. Granados to come up here to counsel table." Id.

After Mr. Granados verified that he had caused the Natio Nation documents to be filed, the district court did not allow either Mr. Jeffs or Mr. Granados to present any arguments. (R: 294:3). Instead, the district court summarily stated that it had reviewed the Nato Nation documents "and found that their legal contentions are not warranted by existing law and are in fact frivolous, and that the allegations in them a, don't have

evidentiary support." (R 294:3-4). The district court then told Mr. Granados that he could "address the court on what you think should happen at this point." (R.294:4).

Mr. Granados stated that he had been sick and unable to pay Mr. Jeffs but thought that his case was meritorious. (R. 294:4). Mr. Granados also told the district court that he had only received notice of the hearing late in the evening of December 8 and had been impossible for him to retain another attorney in the short time that he had been given. (R 294:5).

After allowing Mr. Granados to speak his few sentences, the district court held that "there's no reasonable basis to believe that these documents are anything other than frivolous, that they have been submitted to the court for, the only reason was to delay these proceedings ... Based upon that finding under Rule 11 of the Utah Rules of Civil Procedure I'm going to strike your answer and counterclaim and enter a default against you." (R 294:8). The district court then granted Mr. Jeffs' motion to withdraw. (R 294:10). The district court did not file any written order regarding it Rule 11 hearing. Instead, it entered minutes stating that "[t]he Court strikes the Defendant's answer and counterclaim and enters a default against the defendant," as well as a final Judgment. (R. 204, 223).

According to the transcript, the basis for the district court's finding were a Federal Court of Appeals for the Tenth Circuit case titled Nato Nation v. State of Utah, which held that the Nato Nation was not recognized as having any standing by the United States Department of the Interior, and its review of the Bureau of Indian Affairs listing of federally recognized Indian entities. (R: 294:6). At the hearing on GR 2's Motion to Set Aside Judgment on December 23, 2008, the district court provided little further explanation for its December 9 ruling. Instead, it said that "[i]f you take the Nato Nation and stick it into Google, one of the first things that comes up is the 10th Circuit decision

... So I really believe that Mr. Granados could have, a found that with fairly easy access." (R. 295:28).

At the December 23 hearing, the district court also referred to prior hearings in which DFI had claimed that Mr. Granados conveyed fractional interests in a California property to different entities which were later found to be fictitious, that each of those fictitious entities then filed their own bankruptcies and invoked the automatic stay, and that the bankruptcy court finally ruled that this was a scheme and an artifice to defraud DFI. (R. 292:7-8). The district court noted that it had previously not had any evidence that Mr. Granados had in fact deeded fractional interests but Mr. Granados had substantiated this in the Nato Nation documents. (R. 295:29). The district court stated that it had decided on the ultimate sanction of dismissal because GR 2 had already been "devious" prior to filing the Nato Nation documents and "the specific purpose of filing the order attempting to stay this case was to derail a trial which had been set." (R. 295:31).

However, the Nato Nation documents do not contain any reference to Mr. Granados deeding fractional interests in order to defraud creditors. Instead, the only relevant document within the record is an affidavit by Mr. Granados, attached as Exhibit B of GR 2's answer and counterclaim, stating that Mr. Granados had deeded fractional interests in his property in exchange for three installments of $45,000. (R. 11). The ruling of the bankruptcy court proffered by DFI was not entered in GR 2's bankruptcy case and did not find that GR 2 or Mr. Granados were involved in the attempt to defraud creditors. (R. 65-85).

## SUMMARY OF THE ARGUMENT

First, the district court erred in applying Rule 11 to the filings made by Mr. Granados because Rule 11 only applies to representations made by an attorney or an unrepresented party. In this case, Rule 11 was never invoked because GR 2 was represented by an attorney at the time of the filings and GR 2's attorney did not file the offending documents. Furthermore, because GR 2 is a corporate entity and Mr. Granados is not an attorney, Mr. Granados' actions cannot be imputed to GR 2.

Second, the district court violated the due process notice requirements Rule 11 by failing to enter an order to show cause and providing GR 2 with only a day's notice of the Rule 11 hearing. In addition, the district court deprived GR 2 of its due process right to a reasonably respond under Rule 11 when it asked GR 2's attorney to take a seat without responding to the Rule 11 violations, summarily held that GR 2 had violated Rule 11, and allowed a non-attorney to speak on behalf of GR 2 after already determining that a violation of Rule 11 had occurred.

Third, the district court failed to follow the procedural requirements of Rule 11 when it failed to enter an order describing GR 2's violative conduct and explaining the basis for its sanctions. The district court did not enter a written order and the written record and the transcripts of the hearing are unclear as to whether the statements by the district court constituted formal findings of fact and conclusions of law.

Fourth, the district court erred as a matter of law in holding that the filing of the Nato Nation documents violated Rule 11 because its determination was based solely on the Nato Nation's status as an unrecognized tribe. Filing the Nato Nation pleadings was objectively reasonable under the circumstances because there is no Utah law prohibiting the filing of pleadings from the tribal courts of native American tribes that have not been recognized by the United States Department of the Interior (USDOI) or finding the filing of such pleadings to be frivolous or another violation of Rule 11. Similarly, there is no

clear law from other jurisdictions making such a finding.

Fifth, the District Court erred as a matter of law because Rule 11does not authorize or contemplate entry of a default judgment as a sanction. Alternatively, even if the Court was authorized to impose the sanction of default judgment under Rule 11, such a sanction was not warranted under the circumstances of this case.

## ARGUMENT

**I. The district court erred as a matter of law in holding that GR 2 was responsible, under Utah Rule of Civil Procedure 11(b), for a filing made by a non-attorney member of GR 2 because Rule 11(b) only applies to filings made by an attorney or unrepresented party, GR 2 was represented by an attorney at the time, and the filing was not made by GR 2's attorney.**

The district court erred in holding GR 2 responsible under Rule 11(b) for the filings made by Mr. Granados because GR 2 was represented by an attorney at the time of the filings and GR 2's attorney did not file the offending documents. Utah Rule of Civil Procedure 11(b) states that "[b]y presenting a pleading, written motion, or other paper to the court (whether by signing, filing, submitting, or advocating), an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances," that the representations within the document meets the criteria specified in subsections (b)(1) through (b)(4). Utah Rule of Civil Procedure 11(b) (2009) (emphasis added). As a result, Rule 11(b) only applies to representations made by an attorney or an unrepresented party. It cannot apply to a filing made by someone other than the attorney of a represented party.

While the scope of Rule 11(b) is a question of first impression in Utah, some guidance is provided by Agency of Natural Resources v. Lyndonville Savings Bank & Trust Co., 811 A.2d 1232 (Vt. 2001), in which the Vermont Supreme Court was confronted with similar circumstances. In Lydonville, the Vermont Agency of Natural Resources had issued an administrative order claiming that the Bank had violated Vermont's "heavy cutting" logging law and imposing a civil penalty of $22,000. Id. The Bank subsequently challenged the administrative order in the district court. Id. During the pendency of the action, the Bank served the Agency with a motion for sanctions under Vermont Rule of Civil Procedure 11, which is substantially similar to Utah Rule of

Civil Procedure 11. Id. The Rule 11 motion asserted that the Agency's decision to proceed with an enforcement action against the Bank was frivolous because the Agency should have known that it would be unable to prove that the Bank had violated the logging law at the time it entered the administrative order. Id. The Rule 11 motion was directed at actions of the Agency itself rather than the actions of the Agency's attorney. Id. While the district court subsequently ordered that the Agency's administrative order be dismissed with prejudice, it denied the Bank's Rule 11 motion for sanctions. Id.

When the Bank appealed the district court's denial of sanctions, the Vermont Supreme Court affirmed the district court and held that Rule 11 was inapplicable to the situation. Id. at 233. Specifically, the Vermont Supreme Court held that "[s]anctions against a represented party are not covered by Rule 11; nor are sanctions based upon out-of-court activity... Rule 11 is the appropriate vehicle only if one seeks sanctions against an unrepresented party or a lawyer for a party. Neither Rule 11 nor its safe harbor provision applies if the moving party is seeking sanctions against a represented litigant." Id. Accordingly, while "Rule 11 prohibits certain misconduct by 'an attorney or unrepresented party,' ... and allows sanctions against those persons[,]" the court found it was not applicable where the Bank sought to apply Rule 11 to an out-of-court document that had not been filed by the Agency's attorney. Id.

Similarly, in this case, GR 2 was not an unrepresented party at the time the Nato Nation documents were filed and it is undisputed that Mr. Jeffs, GR 2's attorney at the time, did not file the Nato Nation documents. Furthermore, even if Mr. Granados believed that GR 2 was no longer represented by Mr. Jeffs at the time of the Nato Nation documents were filed, his actions cannot be imputed to GR 2. "It has long been the law of this jurisdiction that a corporate litigant must be represented in court by a licensed attorney." Tracy-Burke Associates v. Dept. of Employment Security, 699 P.2d 687, 688 (Utah 1985) (dismissing appellant's petition for writ of review because the appellant was not represented by an attorney). Mr. Granados is not an attorney and, as a result, he

cannot represent GR 2 in court. Indeed, the district court recognized as much when it told Mr. Jeffs that "Mr. Granados is attempting to move forward pro se representing a corporate entity, which as we all know is not going to happen ... [s]o in your letter inform him that if he wants to be heard he'll need to bring a lawyer." (R 293:6-7).

Accordingly, Rule 11 simply does not apply to the circumstances of this case and the district court erred as a matter of law in sanctioning GR 2 under Rule 11. Specifically, Rule 11 was never invoked because the requirements of Rule 11(b) were not met – the Nato Nation documents were not filed by GR 2's attorney nor was GR 2 an unrepresented party at the time of the filing. Furthermore, because GR 2 is a corporate entity and Mr. Granados is not an attorney, Mr. Granados' actions cannot even be imputed to GR 2.

## II. District Court violated GR 2's due process rights under Utah Rule of Civil Procedure 11(c) when it failed to enter an order to show cause prior to sua sponte scheduling a Rule 11 hearing, provided GR 2 with only a day's notice of the Rule 11 hearing, and did not provide GR2 with any reasonable opportunity to respond prior to making a determination at the hearing.

The due process requirements of Rule 11 require that a party receive sufficient notice and a reasonable opportunity to respond prior to the imposition of sanctions. However, these due process requirements were not met in this case because the district court failed to enter an order to show cause prior to scheduling the Rule 11 hearing, only provided GR 2 with a day's notice prior to the hearing, did not provide GR 2 with an opportunity to submit a written brief prior to the hearing, and did not provide GR 2 with an opportunity to respond at the hearing itself. In order to initiate Rule 11 sanction sua sponte, "the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto." Utah Rule of Civil Procedure 11(c)(1)(B) (2009). Furthermore, under Rule 11, a court may only impose sanctions

"[i]f, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated." Utah Rule of Civil Procedure 11(c) (2009) (emphasis added). In this case, the district court failed to comply with either of these due process requirements of Rule 11.

First, the district court failed to enter an order describing the offending conduct and directing GR 2 to show cause why it has not violated Rule 11. Utah's Rule 11 is based upon the substantially similar federal rule. The federal rule's requirement that the court enter an order to show cause was added because a party is not shielded by the 21-day "safe harbor" period when a court initiates Rule 11 sanctions sua sponte. The Notes of the Advisory Committee on the 1993 amendments to Federal Rule of Civil Procedure 11, specifically note that "[t]he power of the court to act on its own initiative is retained, but with the condition that this be done through a show cause order ... [t]his procedure provides the person with notice and an opportunity to respond." Federal Rule of Civil Procedure 11 Advisory Committee Notes to 1993 Amendments. As a result, federal appellate courts have held that "when the district court itself initiates sanctions proceedings, it shall enter an order describing the specific conduct that appears to violate Rule 11(b) and directing the attorney to show cause why he has not committed a violation with respect to that specific conduct." Thornton v. General Motors Corp., 136 F.3d 450, 451 (5th Cir. 1998) (reversing and vacating district court's Rule 11 sanctions because the court's show cause order did not describe the specific conduct for which it subsequently sanctioned the attorney deprived attorney of adequate notice to afford him an opportunity to respond). See also L.B. Foster Co. v. America Piles, Inc., 138 F.3d 81, 89 (2nd Cir. 1998) ('[i]f the sanctions are to be imposed sua sponte [under Rule 11], the court must proceed by order to show cause"). Similarly, in Poulsen v. Freer, 946 P.2d 738, 743 (Utah Ct. App. 1997), the Utah Court of Appeals noted that "[w]hen a court imposes sanctions sua sponte, due process requirements are met if the court issues an order to show cause ... and allows the party a reasonable time in which to file a response."

Accordingly, in this case, the district court did not comply with the requirements of Rule 11 when it failed to enter an order to show cause.

Second, GR 2 did not receive sufficient notice of the Rule 11 hearing and was denied a reasonable opportunity to respond at the hearing itself. "Timely and adequate notice and an opportunity to be heard in a meaningful way are the very heart of procedural fairness." State v. Rawlings, 893 P.2d 1063, 1069 (Utah Ct. App. 1995). "Sufficient notice is informing a party of the specific issues which they must prepare to meet and giving the party a reasonable opportunity to know the claims of the opposing party and to meet them." Id. (quotations omitted). See also Ex Rel. B.R., 2006 UT App 354, ¶77 ("Parties are deprived of due process when they are not properly informed of the nature of a proceeding, or notice is not given sufficiently in advance to allow preparation"). The only notice GR 2 received regarding the Rule 11 sanctions was during a review hearing the district court held with counsel on December 8, 2008, in which the court stated that it would hold a Rule 11 sanction hearing the very next day. Furthermore, the district court did not inform GR 2's counsel that he should be prepared to respond on GR 2's behalf at the Rule 11 hearing. Instead, the district court told Mr. Jeffs that he would be allowed to withdraw as counsel at the end of the hearing, instructed Mr. Jeffs to inform GR 2 of the hearing through an off-record letter, and stated "that if [GR 2] wants to be heard [it will] need to bring a lawyer." (R 293:5-7). GR 2 only received the letter informing it of the Rule 11 hearing in the late evening and, as a result, was unable to retain new counsel on the morning before the hearing. Given the timing and nature of the notice GR 2 received, it was clearly not afforded sufficient notice to adequately respond at the Rule 11 hearing.

Furthermore, GR 2 was deprived of any meaningful opportunity to respond at the Rule 11 hearing itself. Although Mr. Jeffs initially appeared for GR 2, the district court did not ask him to respond to the Rule 11 allegations on behalf of GR 2. Instead, it instructed Mr. Jeffs to take a seat and instructed Mr. Granados to come up to the counsel

table. (R. 294:1-2). Then, after verifying that Mr. Granados had filed the Nato Nation documents, the district court summarily concluded that it had reviewed the Nato Nation documents "and found that their legal contentions are not warranted by existing law and are in fact frivolous, and that the allegations in them a, don't have evidentiary support." (R 294:3-4). Although the district court later told Mr. Granados that he could "address the court on what you think should happen at this point[,]"Mr. Granados is not an attorney and his subsequent statements did not represent the response of GR 2. (R.294:4). In effect, the district court made its Rule 11 determination without affording GR 2 with any opportunity to respond.

As a result, the district court violated the due process notice requirements Rule 11 by failing to enter an order to show cause and providing GR 2 with only a day's notice of the Rule 11 hearing. Furthermore, the district court deprived GR 2 of its due process right to a reasonable response under Rule 11 when it asked GR 2's attorney to take a seat without responding to the Rule 11 violations, summarily held that GR 2 had violated Rule 11, and allowed a non-attorney to speak on behalf of GR 2 after it had already determined that a violation of Rule 11 had occurred.

## III. The District Court violated the procedural requirements of Utah Rule of Civil Procedure 11 when it failed to enter an order describing the violating conduct and explaining the basis for the sanction imposed.

The district court failed to follow the procedural requirements of Rule 11 when it failed to enter an order describing GR 2's violative conduct and explaining the basis for its sanctions. "When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed." Utah R. Civ. P. 11(c)(3) (2008). As a result, the Utah Supreme Court has held that an order entered under Rule 11 must explain why the conduct was found to be in violation and why the court imposed the particular sanction. See Morse v. Packer, 1999 UT 5, ¶ 13-14,

973 P.2d 422, (Utah 1999) ("there should be findings on the record, or other appropriate explanation of the trial court's rationale, that will enable the appellate courts to apply the Sutliff standard"). Thus, in Crockett v. Pinecrest Pipeline Operating Co., 909 P.2d 225, 232 (Utah 1996), the Utah Supreme Court reversed an award of sanctions and remanded the matter to the district court for the entry of more detailed findings of fact and conclusions of law because it could not "determine whether the imposition of sanctions [was] proper as a matter of law and, if the sanctions were imposed for a violation of rule 11, whether the district court abused its discretion in formulating the type and amount of the sanction."

In this case, the district court failed to enter any written order detailing GR 2's offensive conduct and the basis for its sanction of default judgment. Instead, during the December 9, 2008, hearing, the Court stated that filing of the Nato Nation documents were violated Rule 11 because a Federal Court of Appeals for the Tenth Circuit case titled Nato Nation v. State of Utah and the Bureau of Indian Affairs' listing of federally recognized Indian entities did not recognize the Nato Nation as having any standing with the United States Department of the Interior. (R: 294:6). However, the court did not enter into any examination of whether Mr. Granados' research into the law and facts surrounding the filing were objectively reasonable under the circumstances. See Taylor v. Hansen, 958 P.2d 923, 930 (Utah Ct. App. 1998) ("[i]n determining whether conduct violates Rule 11, the court must focus on whether the alleged violator's research into the law and facts surrounding a filing is 'objectively reasonable under all the circumstances.'"). Nor did the court explain why the filing of the Nato Nation documents was, in itself, a violation of Rule 11. Furthermore, the district court failed to provide any explanation on the record for why it imposed the sanction of a default judgment against GR 2.

At the hearing on GR 2's Motion to Set Aside Judgment on December 23, 2008, the district court provided little further explanation for its Rule 11 determination.

Instead, it said that "[i]f you take the Nato Nation and stick it into Google, one of the first things that comes up is the 10th Circuit decision ... So I really believe that Mr. Granados could have, a found that with fairly easy access." (R. 295:28). At the December 23, 2008, hearing, district court did stated that it had chosen sanction of dismissal because GR 2 had already been "devious" prior to filing the Nato Nation documents and "the specific purpose of filing the order attempting to stay this case was to derail a trial which had been set." (R. 295:31). However, the written record and the transcripts of the hearing are unclear as to whether these statements by the district court constituted formal findings of fact and conclusions of law.

## IV. The District Court erred as a matter of law in holding that the filings by Mr. Granados violated Utah Rule of Civil Procedure 11 when (1) there is no Utah precedent dealing with pleadings issued by the tribal courts of unrecognized native american tribes and (2) it is not well settled in other jurisdictions that the filing of such pleadings is a Rule 11 violation.

The district court erred as a matter of law in holding that the filing of the Nato Nation documents violated Rule 11 because its determination was based solely on the Nato Nation's status as an unrecognized tribe. A violation of Rule 11 occurs if a court determines that a pleading presented by a person contains legal contentions unwarranted by existing law or a frivolous argument for the extension, modification, or reversal of existing law. Utah R. Civ. P. 11 (b)(2) (2008). However, "[i]n determining whether conduct violates Rule 11, the court must focus on whether the alleged violator's research into the law and facts surrounding a filing is 'objectively reasonable under all the circumstances.'" Taylor v. Hansen, 958 P.2d 923, 930 (Utah Ct. App. 1998); Barnard v. Sutliff, 846 P.2d 1229, 1236 (Utah 1992). As the Utah Supreme Court noted in Barnard v. Sutliff, 846 P.2d 1229, 1236 (Utah 1992):

"Rule 11 does not impose a duty to do perfect or exhaustive

> research. The appropriate standard is whether the research was objectively reasonable under all the circumstances. Nor does rule 11 require the attorney to reach the correct legal position from the research. It is enough that the attorney's reading of the law is a reasonable one. Thus, once an attorney forms a reasonable opinion after conducting appropriate research, the mere fact that the attorney's view of the law was wrong cannot support a finding of a rule 11 violation ... In short, the attorney's view must be objectively reasonable when it is compared to existing law."

In this case, GR 2 does not dispute that the Nato Nation is unrecognized by the USDOI. Instead, GR 2 asserts that filing the Nato Nation pleadings was objectively reasonable under the circumstances because there is no Utah law prohibiting the filing of pleadings from the tribal courts of native American tribes that have not been recognized by the United States Department of the Interior (USDOI) or finding the filing of such pleadings to be frivolous or another violation of Rule 11. Similarly, there is no clear law from other jurisdictions making such a finding.

First, there are no reported Utah cases regarding the filing of pleadings from an unrecognized tribal court in a Utah district court. There are only cases addressing the jurisdiction of the tribal courts of recognized native American tribes. See e.g. State v. Reber, 2005 UT App 485, ¶ 7 (stating that jurisdiction lies in federal or tribal court for crimes committed in Indian Country if either the defendant or the victim is an Indian); In the interest of D.A.C. v. P.D.C., 933 P.2d 993, 995-96 (Utah Ct. App. 1997) (stating that tribal courts have exclusive jurisdiction over child custody proceedings involving Indian children domiciled on a reservation and concurrent, but presumptively tribal, jurisdiction in proceedings involving Indian children not domiciled on a reservation); Searle v. Searle 2001 UT App 367 (Utah Ct. App. 2001) (detailing interaction between tribal court and juvenile court in child custody proceedings). As a result, Utah law regarding the status of pleadings from the tribal courts of unrecognized tribes is not settled.

Second, cases from other jurisdictions do not appear to hold that the filing of

pleadings from unrecognized tribal courts is a violation of Rule 11. At both the December 9 and December 23 hearings, the district court referred to a Tenth Circuit court of appeals case titled Nato Nation v. Utah. Presumably the district court was referring to an unpublished decision, Nato Indian Nation v. State of Utah, No. 02-4062 (10th Cir. Aug. 8, 2003) (a copy of this unpublished opinion is attached hereto as Addendum A). However, in Nato Nation, the Tenth Circuit affirmed the district court's determination that the Nato Nation is not an "Indian tribe or band with a governing body duly recognized by the Secretary of the Interior." It did not address whether the filing of pleadings from the Nato Nation tribal court in federal district court violated Rule 11. However, in Richmond v. Wampanoag Tribal Court Cases, 431 F.Supp.2d 1159, 1160-61 (D. Utah 2006), the federal district court for the state of Utah was confronted with a writ of mandamus captioned in the "Pembina Nation Little Shell California Federal Tribal Circuit Court." As in this case, the "Pembina Nation Little Shell Band" was found to be an unrecognized tribe. Id. at 1167-69. However, the Utah federal district court did not sua sponte raise the issue of a Rule 11 violation in response to the filing. Instead, the district court dismissed the case for lack of subject matter jurisdiction. Id. at 1160. When the petitioner sought to amend his petition, Judge Jenkins conducted a careful examination of the law in a 24 page decision before denying the motion to amend. As a result, it does not appear that other jurisdictions find that the filing of pleadings from the tribal courts of unrecognized tribes are, per se, a violation of Rule 11.

## V. The District Court erred as a matter of law because entry of a default judgment is not authorized as a sanction for a violation of Utah Rule of Civil Procedure 11 or, alternatively, the District Court abused its discretion, under the circumstances of this case, when it imposed the sanction of a default judgment.

Rule 11 does not appear to contemplate the sanction of a default judgment and,

alternatively, if such a sanction is appropriate under Rule 11, the district court abused its discretion in imposing such a sanction in this case. "A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated ... the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorney fees and other expenses incurred as a direct result of the violation." Utah Rule of Civil Procedure 11(c)(2) (2009). Accordingly, under the plain language of the rule, the court is only authorized to enter an order to pay a penalty to the court or attorney fees. While the Rule authorizes the court to enter a directive of a nonmonetary nature as a sanction, Rule 11 does not appear contemplate the entry of an order of default judgment. Indeed, the Utah Court of Appeals has previously held that the normal sanction for a Rule 11 violation is recovery of attorneys' fees. Bailley-Allen Co.,Inc. v. Kurzet, 945 P.2d 180, 194 (Utah Ct. App. 1997). Accordingly, the district court's entry of a default judgment against GR 2 was not authorized as a sanction under Rule 11.

Alternatively, even if the Court had the authority to impose the sanction of default judgment under the rule, such a sanction is not warranted under the circumstances of this case. Rule 11 states that the "sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct." Utah Rule of Civil Procedure 11(c)(2) (2009). However, the entry of a default judgment is a severe sanction. See UDOT v. Osguthorpe, 892 P.2d 4, 7 (Utah 1995) ("The striking of pleadings, entering of default, and rendering of judgment against a disobedient party are the most severe of the potential sanctions that can be imposed upon a nonresponding party ... [t]he courts, in the interest of justice and fair play, favor, where possible, a full and complete opportunity for a hearing on the merits of every case." Thus, within the context of Rule 37 discovery violations where the sanction of a default judgment is explicitly authorized, the

sanctioned party must usually act in an egregious or willful manner before a court imposes the sanction of a default judgment. See Hales v. Oldroyd, 2000 UT 75, 999 P.2d 588, 595 (Utah Ct. App. 2000) (affirming dismissal based on ample evidence of multiple delays and failures to respond to discovery requests and court orders); Osguthorpe, 892 P.2d at 8 (finding more than adequate evidence that Osguthorpe willfully failed to respond to the court order compelling discovery). In this case, the filing of the Nato Nation documents alone does not provide sufficient grounds for entry of a default judgment. The Petition was not filed in violation of a Court order, nor was it based upon egregious conduct or a willful defiance of the Court's authority or jurisdiction. Furthermore, while the district court asserted that GR 2 had previously acted in a "devious manner," it was referring to a proffer by DFI that Mr. Granados conveyed fractional interests in a California property to different entities which were later found to be fictitious, that each of those fictitious entities then filed their own bankruptcies and invoked the automatic stay, and that a bankruptcy court finally ruled that this was a scheme and an artifice to defraud DFI. (R. 292:7-8). However, while Mr. Granados had admitted that he had deeded fractional interests in his property in exchange for three installments of $45,000, there is no evidence in the record that Mr. Granados deeded the fractional interests in an effort to defraud DFI or had been involved in a scheme or artifice to defraud DFI or deceive the bankruptcy court. (R. 11). Indeed, the finding of a scheme to defraud DFI was not entered in a bankruptcy case not involving GR 2, and the order of the bankruptcy court did not find that GR 2 or Mr. Granados were involved in the attempt to defraud creditors. (R. 65-85). Accordingly, the district court abused its discretion when it imposed the harsh sanction of a default judgment.

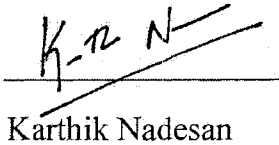
## CONCLUSION

For the foregoing reasons, Appellant respectfully requests that the District Court's

December 9, 2008, Order and Judgment be reversed and the case be remanded to the District Court.

RESPECTFULLY SUBMITTED this 30th day of April, 2009.

NadesanBeck P.C.



Karthik Nadesan
*Attorney for GR 2 Enterprises LLC*

## CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2009, a true and correct copy of the foregoing **BRIEF OF APPELLANT** was sent by U.S Post to the following:

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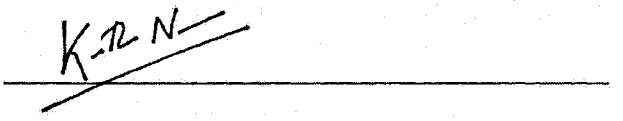

# ADDENDUM A

**UNITED STATES COURT OF APPEALS**

**TENTH CIRCUIT**



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| NATO INDIAN NATION,<br><br>Plaintiff-Appellant,<br><br>v.<br><br>STATE OF UTAH,<br><br>Defendant-Appellee. | No. 02-4062<br><br>(D. Utah)<br><br>(D.Ct. No. 2:01-CV-802-J) |

## ORDER AND JUDGMENT(*)

Before **SEYMOUR**, **MURPHY**, and **O'BRIEN**, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Nato Indian Nation (Nato) appeals the dismissal of its complaint against the State of Utah by the United States District Court for the District of Utah. Nato presents itself as "a sovereign indigenous government, whose citizenship is comprised of federally supervised and non-federally supervised indigenous citizens from various [Native American] tribal affiliations . . . ." Apparently, Nato entered into an "intent to Joint Venture" with a private party regarding a mineral interest on state land administered by the State of Utah School and Institutional Trust Lands Administration.(1) When Nato was informed by an officer from the Trust Lands Administration that another private party claimed ownership to the mineral interest, it filed this complaint, signed by Henry Clayton, who listed his capacity as Chief Justice, Ministry of Justice, Western Regional Office, First Federal District Court, Nato Indian Nation. The complaint alleges the State of Utah mismanaged school trust lands relating to Nato's mineral interest.(2)

The State filed a motion to dismiss, which the district court granted. The court held: 1) it lacked subject matter jurisdiction over Nato's claims under either 28 U.S.C. § 1331 or 28 U.S.C. § 1362; 2) the White Mesa Utes and/or the Skull Valley Band of Goshutes could seek relief on their own initiative; 3) absent formal recognition by the Department of the Interior, Nato lacked standing to assert rights before the court as a recognized Native American Indian tribe; and 4) the two individuals, Ron Allen and Chief Henry Clayton, who represented Nato at the hearing on the State's motion to dismiss were not licensed attorneys and were not entitled to appear before the court in a representative capacity. The court later denied Nato's motion to

lter or amend judgment.

)n appeal, Nato filed two separate docketing statements and one brief containing two parts. One docketing tatement and the second part of the brief were authored by Chief Henry Clayton; they address his ability to epresent Nato in court proceedings. The other docketing statement and first part of the brief were filed and igned by a licensed attorney; they deal with the other issues Nato raises in this appeal.[3]

n response to the docketing statement filed by Chief Henry Clayton, the State filed a motion to disqualify im from filing pleadings or appearing in connection with this appeal. We agree with the State; a non-awyer may not represent Nato in federal court.[4]

ndividuals may appear in court pro se, but a corporation, other business entity, or non-profit organization nay only appear through a licensed attorney. *Harrison v. Wahatoyas, L.L.C.*, 253 F.3d 552, 556-57 (10th Cir. 2001); *Flora Constr. Co. v. Fireman's Fund Ins. Co.*, 307 F.2d 413, 414 (10th Cir. 1962), *cert. denied*, 371 U.S. 950 (1963); *Strong Delivery Ministry Ass'n v. Bd. of Appeals of Cook County*, 543 F.2d 32, 33 (7th Cir. 1976). *See generally Turner v. American Bar Ass'n*, 407 F.Supp. 451, 476 (D. Ala. 1975) (consolidation of cases from across the nation at the order of Chief Justice Warren E. Burger to address the issues of pro se epresentation and the right of unlicensed persons to represent others); *Pilla v. American Bar Ass'n*, 542 F.2d 56 (8th Cir.1976). Nato is such an entity.

Nato filed a consent to allow Chief Henry Clayton to represent it, but that is of no moment because egulation of practice in the courts is a matter of positive law, serving societal and systemic needs and ranscending the stated preference of particular litigants, particularly non-individuals. Chief Henry Clayton nay not represent Nato in this appeal; the docketing statement and the portion of the brief filed by him are truck.

The counseled portion of the brief also claims it was error for the district court to refuse Chief Henry Clayton's request to represent Nato. It does so in summary fashion, unburdened by citation of authority or ogent argument, but merely adopts by reference the arguments of Chief Henry Clayton. Our reasons for efusing those filings and arguments in this court apply equally to proceedings in the trial court. The district udge was correct in refusing to allow non-lawyers to practice law.

We now address the other issues raised by Nato through counsel. In several arguments, Nato objects to the manner and scope of the district court's order dismissing its complaint. It seems to concede a lack of federal uestion jurisdiction, but argues that once the district court determined it lacked federal question jurisdiction should not have addressed the other issues: Chief Henry Clayton's representation and Nato's standing to ring suit as a Native American Indian tribe. Nato further argues that even if it were proper for the court to ddress these issues, the court erred in its determination.

We review de novo the district court's dismissal of a complaint for lack of subject matter jurisdiction. *Ordinance 59 Ass'n v. United States Dept. of Interior Secretary*, 163 F.3d 1150, 1152 (10th Cir. 1998). Nato's complaint asserts the federal district court has jurisdiction under 28 U.S.C. § 1362 and 28 U.S.C. § 331. "[B]oth § 1362 and § 1331 require that the matter in controversy be one arising under the Constitution, laws, or treaties of the United States." *Mescalero Apache Tribe v. Martinez*, 519 F.2d 479, 480 (10th Cir. 1975).[5] But the jurisdictional ground is more fertile for recognized Indian tribes because of reaty, tribal and other federally derived rights. Accordingly, it was not error for the district court to inquire nto Nato's status, and it was correct in determining Nato had no recognized status. The record reveals no

qualifying facts as dictated by 28 U.S.C. § 1362. That resolved, we now turn to the more general federal question issue.

As best we can determine from the pleadings and briefs, Nato's action is akin to a quiet title action. It complains that the state failed to determine or improperly determined the correlative rights of claimants to interests derived from a state mineral lease of state resources.[6] Those allegations do not present a controversy arising under the Constitution, laws or treaties of the United States,[7] and it readily appears that allowing an opportunity to amend would have been futile. *See Curley v. Perry*, 246 F.3d 1278, 1281-82 (10th Cir.), *cert. denied*, 534 U.S. 922 (2001).

We **AFFIRM** the district court's dismissal of Nato's complaint for lack of subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1362, its determination that Nato is not an "Indian tribe or band with a governing body duly recognized by the Secretary of the Interior," and its refusal to allow Chief Henry Clayton to represent Nato in court proceedings.

**Entered by the Court:**

**TERRENCE L. O'BRIEN**

United States Circuit Judge

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## FOOTNOTES

Click footnote number to return to corresponding location in the text.

[*] This order and judgment is not binding precedent except under the doctrines of law of the case, *res judicata* and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

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[1] Other than asserting it is "a sovereign indigenous government," Nato provides no indication of its origin or legal status.

[2] Nato's complaint attempted to include potential claims of the White Mesa Ute Indians and the Skull Valley Band of Goshute Indians concerning interests wholly unrelated to Nato's alleged mineral interest.

[3] Tenth Circuit Rule 3.4(C) states: "An issue not raised in the docketing statement may be raised in appellant's opening brief." Thus, we will address the issues raised in the part of the brief authored by counsel for Nato even though they were not contained in the docketing statement filed by counsel.

[4] In this motion the State also requests we summarily dispose of the sole issue raised in the docketing statement filed by Chief Henry Clayton. In light of our resolution of the issues raised in Nato's brief below, this aspect of the motion is denied as moot.

[5] 28 U.S.C. § 1331 states: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." And 28 U.S.C. § 1362 provides: "The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a

governing body duly recognized by the Secretary of the Interior, **wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.**" (Emphasis supplied.)

Since Nato does not describe its legal status (merely alleging it is "a sovereign indigenous government") it is impossible to know whether it has the legal capacity to contract or otherwise hold property.

We also agree with the district court's determination that the purported grievances of the individual tribes listed in Nato's complaint were not properly brought by Nato. Further, Nato has failed to raise any argument regarding this issue in its opening brief, and as a consequence, it is waived. *State Farm Fire & Cas. Co. v. Mhoon*, 31 F.3d 979, 984 n.7 (10th Cir. 1994).

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